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Wasco Lindung Sdn Bhd v Lustre Metals & Minerals Sdn Bhd

B

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-261–07 OF 2014
WONG KIAN KHEONG JC
21 OCTOBER 2014

C

Contract — Breach — Sale of goods — Contract of sales — Whether there were implied conditions — Breach of — Whether there was contract of sale between parties — Whether goods corresponded with description in proforma invoice and sample given — Whether defendant breached implied conditions — Whether defendant merely purchasing agent — Measure of damages — Mitigation of losses — Entitlement to claim sum paid to defendant and differential cost between price paid and replacement cost — Contracts Act 1950 s 74(1) & (2) — Sale of Goods Act 1957 ss 2 & 4(1)

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The plaintiff had ordered from the defendant a supply of 350 metric tons of aluminium ingots at an agreed price of USD679,000 to be delivered in two batches. The first batch of 150 metric tons was to be delivered at the end of April 2014 for USD291,000 while the second batch of 200 metric tons was to be delivered by the end of May 2014 for USD388,000. The plaintiff paid USD87,300 on 16 April 2014 and another USD203,700 on 5 May 2014 and the defendant duly issued the necessary shipping documents. However, on 19 May 2014, when the containers which were supposed to contain the first batch of aluminium ingots arrived at Port Klang, it was discovered that it contained white powder instead. The plaintiff claimed against the defendant a sum of US$394,539.15 (or RM1,271,205.14) and made the application for summary judgment against the defendant. The plaintiff submitted that there was a contract of sale of goods between the parties and the defendant had breached two of its obligations under the contract. The defendant argued that ss 41 and/or 42 of the Contracts Act 1950 applied in this case. The defendant further argued that the sale of goods contract was supposed to be fulfilled by a Chinese supplier ('the third party') and not the defendant and that the defendant was merely a purchasing agent for the plaintiff and should not be held liable. The issues that arose were whether there was a contract of sale and if yes, who were the parties; whether s 31 of the Sale of Goods Act 1957 ('SGA') or ss 38(1), 41 and 42 of the CA applied in this case; whether there was a breach of contract; and whether the plaintiff was entitled to damages.

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Held, allowing the application with costs:

(1) Based on the undisputed contemporaneous documents, it was the defendant and not the third party who had the obligation to deliver the aluminium ingots to the plaintiff under the SGA. Mere references as to the existence of the third party did not give rise to any legally binding relationship between the plaintiff and the third party. The plaintiff could not enforce any contractual obligation nor compel the third party for delivery of the aluminium ingots (see para 33).

(2) If there were any conflicts between the provisions of the two legislations, the specific and subsequent statutory provision, s 31 of the SGA should be given preference as the section is a specific statutory provision applicable to goods and a later statutory provision compared to the provisions of the CA (see para 34).

(3) The defendant had breached the implied conditions under s 15 of the SGA where the goods should have corresponded with the description in the defendant's proforma invoice and s 17(2)(a) where the goods should have corresponded with the aluminium ingot sample given by the defendant in its email to the plaintiff. There was also a third breach under s 57 when the aluminium ingots were not delivered at all by the defendant to the plaintiff (see paras 44–45).

(4) The plaintiff had fulfilled its duty to take reasonable steps to mitigate its losses in respect of the non-delivery of the aluminium ingots which entitled the plaintiff to the sum claimed amounting to US$394,539.15. The plaintiff was also entitled to claim for interests (see paras 48 & 64).

(5) While it was clear that fraud had been committed where the white powder was delivered instead of aluminium ingots, the defendant was already in the process of making an insurance claim against the third party which meant that the defendant had an insurable interest in the matter to be delivered to the plaintiff and the defendant had the intention to take legal action against the third party in China which meant that the defendant was acting in its own right vis a vis the Chinese supplier. Therefore, there was no other reason for the case to go to trial under O 14 r 3(1) of the Rules of Court 2012 (see paras 59, 60(d)–(e) & 61).

[Bahasa Malaysia summary

Plaintif telah memesan daripada defendan bekalan 350 tan matrik jongkong aluminium pada harga yang dipersetujui sejumlah US$679,000 untuk dihantar dalam dua kumpulan. Kumpulan pertama sebanyak 150 tan matrik perlu dihantar pada akhir April 2014 untuk sejumlah US$291,000 manakala kumpulan kedua sebanyak 200 tan matrik perlu dihantar pada akhir Mei 2014 untuk sejumlah US$388,000. Plaintif telah membayar US$87,300 pada 16 April 2014 dan US$203,700 lagi pada 5 Mei 2014 dan defendan telahpun mengeluarkan dokumen-dokumen penghantara yang perlu. Walau bagaimanapun, pada 19 Mei 2014, apabila kontena-kontena yang sepatutnya

mengandungi kumpulan pertama jongkong aluminium tiba di Port Klang, didapati ia sebaliknya mengandungi serbuk putih. Plaintif menuntut terhadap defendan sejumlah US$394,539.15 (atau RM1,271,205.14) dan membuat permohonan untuk penghakiman terus terhadap defendan. Plaintif berhujah bahawa terdapat kontrak untuk jualan barangan antara pihak-pihak dan defendan telah melanggar dua daripada obligasinya di bawah kontrak itu. Defendan berhujah bahawa ss 41 dan/atau 42 Akta Kontrak 1950 ('AK') adalah terpakai dalam kes ini. Defendan selanjutnya berhujah bahawa kontrak jualan barangan itu sepatutnya dipenuhi oleh pembekal Cina ('pihak ketiga') dan bukan defendan dan bahawa defendan hanya ejen membeli untuk plaintif dan tidak patut dipertanggungjawabkan. Isu-isu yang timbul adalah sama ada terdapat kontrak jualan dan jika ada, siapa pihak-pihaknya; sama ada s 31 Akta Jualan Barangan 1957 ('AJB') atau ss 38(1), 41 dan 42 AK terpakai dalam kes ini; sama ada terdapat pelanggaran kontrak; dan sama ada plaintif berhak mendapat ganti rugi.

Diputuskan, membenarkan permohonan dengan kos:

(1) Berdasarkan dokumen-dokumen semasa yang tidak dipertikaikan, ia adalah defendan dan bukan pihak ketiga yang mempunyai obligasi untuk menghantar jongkong aluminium itu kepada plaintif di bawah AJB. Rujukan semata-mata berhubung kewujudan pihak ketiga tidak mewujudkan apa-apa hubungan mengikat yang sah antara plaintif dan pihak ketiga. Plaintif tidak boleh menguatkuasakan apa-apa obligasi kontraktual mahupun memaksa pihak ketiga menghantar jongkong aluminium itu (lihat perenggan 33).

(2) Jika terdapat apa-apa konflik antara peruntukkan kedua-dua perundangan, peruntukan spesifik dan berkanun seterusnya, s 31 AJB patut diberikan keutamaan kerana seksyen itu adalah peruntukan berkanun yang boleh terpakai untuk barangan dan peruntukan berkanun yang selepas itu berbanding dengan peruntukan-peruntukan AK (lihat perenggan 34).

(3) Defendan telah melanggar syarat-syarat tersirat di bawah s 15 AJB di mana barangan itu patut sepadan dengan gambaran dalam invois proforma defendan dan s 17(2)(a) di mana barangan itu patut sepadan dengan sampel jongkong aluminium yang diberikan oleh defendan dalam emelnya kepada plaintif. Terdapat juga pelanggaran ketiga di bawah s 57 apabila jongkong aluminium itu tidak dihantar langsung oleh defendan kepada plaintif (lihat perenggan 44–45).

(4) Plaintif telah memenuhi kewajipannya untuk mengambil langkah-langkah munasabah untuk mengurangkan kerugiannya berkaitan jongkong aluminium yang tidak dihantar itu yang memberi hak kepada plaintif terhadap jumlah yang dituntut berjumlah

US$394,539.15. Plaintif juga berhak untuk menuntut faedah (lihat perenggan 48 & 64).

(5) Apabila jelas bahawa fraud telah dilakukan di mana serbuk putih yang dihantar dan bukan jongkong aluminium, defendan telah pun dalam proses membuat tuntutan insurans terhadap pihak ketiga yang bermaksud defendan mempunyai kepentingan yang boleh diinsuranskan dalam perkara yang perlu dihantar kepada plaintif dan defendan mempunyai niat untuk mengambil tindakan undang-undang terhadap pihak ketiga di China yang bermaksud bahawa defendan bertindak berdasarkan haknya sendiri melalui pembekal Cina itu. Oleh demikian, tiada sebab lain untuk kes ini dibicarakan di bawah A 14 k 3(1) Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 59, 60(d)–(e) & 61).]]]]]]]]

Notes

For cases on sale of goods, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3391–3394.

Cases referred to

Citibank NA v Standard Chartered Bank [2004] 1 SCC 12, SC (refd)
Bauer (M) Sdn Bhd v Daewoo Corp [1999] 4 MLJ 545, CA (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)
Chai Wooi v PP [1957] 1 MLJ 234, CA (refd)
Chegamull Suganmull Sowcar v V Govindaswami Chetty and Ors AIR 1928 Mad 972, HC (refd)
Chinn Swee Onn v Puchong Realty Sdn Bhd [1990] 1 MLJ 108, SC (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)
E & S Ruben Ltd v Faire Bros & Co Ltd [1949] 1 All ER 215, KBD (refd)
Eikobina (M) Sdn Bhd v Mensa Mercantile (Far East) Pte Ltd [1994] 1 MLJ 553, SC (refd)
Haji Nik Ishak bin Haji Nik Daud v Nik Zainab binti Nik Jaafar [1975] 2 MLJ 82, FC (refd)
KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233, CA (refd)
Kabatasan Timber Extraction Co v Chong Fah Shing [1969] 2 MLJ 6, FC (refd)
Lau Sieng Nguong v Hap Shing Co Ltd [1969] 1 MLJ 190, FC (refd)
Lee Heng & Co v C Melchers & Co [1963] 1 MLJ 47, CA (refd)
Lee Sau Kong v Leow Cheng Chiang [1961] 1 MLJ 17, CA (refd)
Letchumi Ammal v Nam Fong Housing Sdn Bhd [1982] 2 MLJ 19, FC (refd)
Lim Kar Bee v Abdul Latif bin Ismail [1978] 1 MLJ 109, FC (refd)
Lim Yoh v Astana Strategi (M) Sdn Bhd & Anor [1998] 3 MLJ 117, HC (refd)
Nagurdas Purshotumdas & Co v Mitsui Bussan Kaisha Ltd [1911] 12 SSLR 67, HC (refd)

National Company For Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283, FC (refd)
Ooi Boon Leong & Ors v Citibank NA [1984] 1 MLJ 222, PC (refd)
Prenn v Simmonds [1971] 3 All ER 237, HL (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
PP v Chew Siew Luan [1982] 2 MLJ 119, FC (refd)
Scott & English (M) Sdn Bhd v Foo Thor Lombong Bijih Sdn & Anor [1985] 1 MLJ 73 (refd)
Tan Ah Tong v Che Pee Saad & Anor and Other Cases (Consolidated) [2010] 6 CLJ 560, CA (refd)
United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor [1999] 1 MLJ 657, FC (refd)
Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd [2010] 3 MLJ 425, CA (refd)

Legislation referred to

Civil Law Act 1956 s 11
Contract Act 1872 [Ind] s 41
Contracts Act 1950 ss 41, 42, 38(1), 74, 74(1), (2), 135
Rules of Court 2012 Order 14 rr 1(1), 2(1), 3(1), O 42 r 12
Sale of Goods Act 1893 [UK]
Sale of Goods Act 1957 ss 2, 4(1), 5(2), 15, 17(2)(a), 31, 57, 61, 61(1), 61(2)(b)

Jack Yow Pit Pin (Kwong Chiew Ee with him) (Rahmat Lim & Partners) for the plaintiff.
Annou Xavier (Azri, Lee Swee Seng & Co) for the defendant.

Wong Kian Kheong JC:

INTRODUCTION

[1] This is a sad case regarding which Malaysian company should bear the loss of aluminium ingots which have been ordered and paid for but not delivered from China.

[2] The following facts of this case are not disputed:

(a) the plaintiff company ('the plaintiff') issued a 'Purchase Order' dated 1 April 2014 ('PO') to the defendant company ('the defendant') wherein the plaintiff ordered a supply of 350 metric tonnes ('MT') of aluminium ingots at a price of US$679,000 to be delivered in two batches as follows:

(i) the first batch of 150 MT of aluminium ingots was to be delivered

by the end of April 2014 ('first batch'). For the first batch, on 4 April 2014, the defendant issued a 'proforma invoice' (should be 'proforma invoice') to the plaintiff at a price of US$291,000 ('the defendant's proforma invoice'). The defendant's proforma invoice requested the plaintiff to pay the first 30% of the sum of US$291,000, namely a sum of US$87,300; and

(ii) the second batch of 200 MT of aluminium ingots was to be delivered by the end of May 2014 ('second batch');

(b) the plaintiff made two payments totaling US$291,000 to the defendant by way of telegraphic transfer (two CIMB Bank Bhd's 'Remittance Application Forms' ('two bank TT forms')) as follows:

(c) a sum of US$87,300 was paid on 16 April 2014; and

(d) a sum of US$203,700 was paid on 5 May 2014;

(a) the defendant issued a 'Commercial Invoice' dated 5 May 2014 to the plaintiff in respect of the first batch and for the receipt of US$291,000 ('the defendant's commercial invoice');

(b) a packing list dated 5 May 2014 for the first batch was issued by the defendant to the plaintiff ('the defendant's packing list');

(c) a bill of lading dated 6 May 2014 ('BL') had been issued in respect of the shipment of the first batch;

(d) on 19 May 2014 when the containers which were supposed to contained the first batch arrived at Port Klang, it was discovered that those containers contained only white powder ('white powder') and not aluminum ingots!;

(e) the defendant lodged a police report on 26 May 2014 ('the defendant's police report') regarding the white powder; and

(f) as the plaintiff did not receive the first batch of aluminium ingots, the plaintiff purchased 349.224 MT of aluminium ingots from a third party at a cost of US$781,033.71 ('replacement cost').

THIS APPLICATION

[3] The plaintiff filed this suit against the defendant ('this suit') and claimed for, among others, the following:

(a) a sum of US$394,539.15 or its equivalent, RM1,271,205.14 (at the exchange rate of US$1:RM3.22 as of 18 July 2014) ('sum claimed');

(b) pre-judgment interest on the sum claimed at the rate of 5%pa from 19 May 2014 until date of judgment;

(c) interest on the sum claimed at the rate of 5%pa from date of judgment until full payment; and

(d) costs.

[4] In this suit, the plaintiff applied for summary judgment against the defendant ('this application'). This is the judgment for this application.

THE PLAINTIFF'S CONTENTIONS IN SUPPORT OF THIS APPLICATION

[5] Mr Jack Yow, learned counsel for the plaintiff, submitted the following:

(a) there was a contract of sale of goods in the form of aluminium ingots between the plaintiff and the defendant;

(b) as the plaintiff only received the white powder, the defendant had breached two obligations under the sale of goods contract because the white powder did not correspond with the:

(i) description given in the defendant's proforma invoice; and

(ii) sample of aluminium ingots given by the defendant to the plaintiff; and

(c) the plaintiff was entitled to the following relief:

(i) the defendant's return of the sum of US$291,000 on the account of total failure of consideration; and

(ii) the sum of US$103,539.15 being the 'differential cost' between US$679,000 (to be paid by the plaintiff to the defendant for first and second batches) and the replacement cost.

[6] The plaintiff relied on the following documents to support this application:

(a) PO;

(b) the defendant's proforma invoice;

(c) two bank TT forms;

(d) the defendant's commercial invoice;

(e) BL;

(f) the defendant's packing list;

(g) the defendant's police report;

(h) a 'without prejudice' letter from the defendant dated 5 June 2014 ('the defendant's letter dated 5 June 2004'); and

(i) a letter from the defendant's solicitors dated 3 July 2014 ('the defendant's letter dated 3 July 2004').

THE DEFENDANT'S SUBMISSION IN RESISTING THIS APPLICATION

[7] The defendant's learned counsel, Mr Annou Xavier, vigorously opposed this application. Mr Annou Xavier submitted that the following two issues warranted a trial of this suit and a dismissal of this application:

(a) whether s 41 and/or s 42 of the Contracts Act 1950 ('CA') applied in this case whereby the sale of goods contract was to be performed by a third party supplier in China named Beijing Tiankai Feng De Chemical Co Ltd ('Chinese supplier') and not by the defendant; and

(b) whether the defendant was only a purchasing agent of the plaintiff whereby the defendant was not liable to the plaintiff in this case.

[8] To support the defendant's above two-fold submission, the defendant relied on the same documents adduced by the plaintiff. The defendant went further and adduced the following documents to oppose this application:

(a) the exchange of emails between the plaintiff and the defendant;

(b) the defendant's 'Purchase Order' issued to the Chinese supplier ('the defendant's PO to Chinese supplier');

(c) the defendant's two payments totaling US$240,000 to the Chinese supplier ('the defendant's payments to Chinese supplier');

(d) the defendant applied for and obtained from the Chinese supplier the following documents:

(i) 'Certificate of Analysis' of the aluminium ingots by the Chinese supplier;

(ii) 'Insurance Certificate'; and

(iii) BL. ('documents from Chinese supplier');

(e) the exchange of emails between the defendant and lawyers in China which evidenced the defendant's intention to take legal action in China against the Chinese supplier ('exchange of emails between defendant and Chinese lawyers'); and

(f) previous transactions from 19 November 2013–7 March 2013 whereby the defendant had sold goods to the plaintiff ('previous transactions') and all the previous transactions had been honoured by the defendant.

ISSUES

[9] To decide this application, the following questions arise:

(a) what kind of evidence should this court consider in deciding whether a contract of sale of goods (aluminium ingots fall within the meaning of 'goods' in s 2 of the Sale of Goods Act 1957 ('SGA')) had been concluded or not in this case;

(b) if a contract of sale of aluminium ingots within the meaning of s 4(1) of the SGA had been concluded in this case:

(i) who was the 'seller' of the aluminium ingots as understood in s 2 of the SGA? Was the 'seller' of aluminium ingots the defendant or the Chinese supplier?;

(ii) was the defendant only a purchasing agent of the plaintiff in respect of the concluded contract of sale of aluminium ingots?; and

(iii) what were the terms and conditions of the contract of sale of aluminium ingots?;

(c) whether ss 41 and/or 42 of the CA applied in this case wherein the plaintiff had agreed to accept delivery of the aluminium ingots by the Chinese supplier and not by the defendant;

(d) was the contract of sale of aluminium ingots breached when the plaintiff received the white powder?;

(e) if there had been a breach of the contract of sale of aluminium ingots, who had committed such a breach?;

(f) what is the measure of damages for a breach of the contract of sale of aluminium ingots?;

(g) is there any issue of fact and/or law which warrants a trial of this suit; and

(h) is there 'some other reason' for a trial of this case under O 14 r 3(1) of the Rules of Court 2012 ('RC') as explained by the Federal Court in *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657, at pp 666–668, namely is there any circumstance that ought to be investigated by this court (some other reason for trial)?

What kind of evidence should be considered by court?

[10] As stated above, both parties relied on a host of documents to support their contentions. Both parties relied on documents after the receipt of the white powder on 19 May 2014, such as the defendant's police report as well as the defendants' letters dated 5 June 2014 and 3 july 2014 ('post-delivery documents').

[11] The defendant went further to rely on documents vis a vis the Chinese supplier, namely the defendant's PO to Chinese supplier, defendant's payments to Chinese supplier and documents from Chinese supplier ('documents between defendant and Chinese supplier').

[12] In this case, there was no formal written contract. Such a fact does not necessarily mean that there is no legally binding contract. This is clear from s 5(2) of the SGA which reads as follows:

> Subject to any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

[13] The lack of a written contract in this case means that it is incumbent on this court to consider all the documents to ascertain whether there is a contract of sale of aluminium ingots. I rely on the judgment of Ismail Khan CJ (Borneo) in the Federal Court case of *Lau Sieng Nguong v Hap Shing Co Ltd* [1969] 1 MLJ 190, at p 192, as follows:

> *It is clear law that where a contract is to be deduced from a set of documents it is necessary to look into the whole of the correspondence between the parties to see if the parties have come to a binding agreement* (see *Hussey v Horne Payne* (1879) 4 App Cas 311, *Bristol Cardiff and Swansea Aerated Bread Co v Maggs* (1890) 44 ChD 616, *May v Thomson* (1882) 20 Ch D 705 723 and *Lau Brothers & Co v China Pacific Navigation Co Ltd* [1965] 1 MLJ 1). (Emphasis added.)

It is to be noted that *Lau Sieng Nguong*, at p 190, concerned the issue whether there had been a concluded contract for the supply of timber logs.

[14] Based on *Lau Sieng Nguong*, I should consider the following contemporaneous documents to ascertain whether there had been a concluded contract of sale of aluminium ingots or otherwise in this case:

(a) the exchange of emails between the plaintiff and the defendant;

(b) PO;

(c) the defendant's proforma invoice;

(d) two bank TT forms;

(e) the defendant's commercial invoice;

(f) BL; and

(g) the defendant's packing list.

[15] I must emphasise that if there had been a written contract in this case, it is trite law that pre-contractual negotiations are not admissible to construe that written contract — please see the Federal Court's judgment given by Raja Azlan Shah CJ (Malaya) (as His Majesty then was) in *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282, at p 283, as follows:

> As Lord Wilberforce said in *Prenn v Simmonds* [1971] 3 All ER 237, 241, 241:
>
> > In my opinion, then *evidence of negotiations … ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.* (Emphasis added.)

It is to be noted that the Federal Court's judgment in *Citibank NA* has been affirmed on appeal by the Privy Council, [1984] 1 MLJ 222.

[16] As held by Lord Wilberforce in the House of Lords case of *Prenn*, only 'evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction' may be admissible to construe that written contract. Accordingly, as the post-delivery documents could not be used to construe a written contract, I should also not consider such documents in deciding whether there was a contract of sale of aluminium ingots in this case.

[17] I now come to the question of whether I can consider the documents between defendant and Chinese supplier in ascertaining whether a contract of sale of aluminium ingots had been concluded in this case. I am of the considered view that I cannot do so. This is because before the receipt of the white powder, the defendant did not inform the plaintiff regarding the documents between defendant and Chinese supplier. Nor did the defendant supply to the plaintiff any one of the documents between defendant and Chinese supplier prior to the receipt of the white powder.

Was there a contract of sale of aluminium ingots in this case?

[18] Section 4(1) of the SGA provides as follows:

> A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. …

[19] In this case, I am satisfied that the contemporaneous documents listed in the above sub-paras 14(a)–(g) evidenced a contract of sale of aluminium ingots within the meaning of s 4(1) of the SGA between the defendant as the 'seller' (as defined in s 2 of the SGA) and the plaintiff as the 'buyer' (as defined in s 2 of the SGA). In particular, I refer to the following documents:

(a) an email dated 21 March 2014 was sent by Ms Koh from the defendant to Ms Eve from the plaintiff (the defendant's email dated 21 March 2014) which stated as follows:

> From: Huefun Koh [mailto: hue_fun@hotmail.com]
>
> Sent: Friday, March 21, 2014 2:22 PM
>
> To: Guan Yee Mei
>
> Cc: ...
>
> Subject: FW: Aluminium Ingot 99.9 Quotation
>
> Dear Ms Eve,
>
> Reference to our earlier conversation, *we withdraw the previous quote as we cannot guarantee the Fe contents. We were quoted by another supplier with premium but will subject to samples approval*. Please refer to the following price:
>
> *Commodity: Aluminium Ingot 99.9%*
>
> *Price: USD1940/Mt CIF Port Klang*
>
> *Quantity: 150Mt*
>
> *Origin: China*
>
> *Payment: Against proforma invoice*
>
> *Delivery: Within 30 days after your pre-payment*
>
> *Validity: Subject to final confirmation*
>
> *We will arrange 500 grams sample for your approval, you will receive the sample within next week.*
>
> Thanks & regards,
>
> Ms Koh
>
> [Defendant's contact details]
>
> (Emphasis added.);

(b) the plaintiff sent an email dated 29 March 2014 to the defendant to remind the defendant to send to the plaintiff a sample of aluminium ingot as stated in the defendant's email dated 21 March 2014:

> On Mar 29, 2014, at 8:22AM, Guan Yee Mei [Plaintiff]
>
> <yeemei.guan@wascoenergy.com> wrote:
>
> Dear Ms Koh [Defendant],
>
> *Any update for the sample you arrange to [Plaintiff]? We need to confirm with you for delivery estimation date after sample confirmation with our QC/QA.*

Please refer to me soonest possible to avoid any delay on delivery. We need the stock by end of Apr/early May 2014.

Thanks & regards,

Eve Guan

Purchasing Executive

(Emphasis added.);

(c) the defendant's email dated 2 April 2014 to the plaintiff:

From: Huefun Koh (hue_fun@hotmail.com)

Sent: Wednesday, 2 Apr, 2014 6:20 pm

To: Guan Yee Mei

(yeemei.guan@wascoenergy.com)

Cc: ...

Dear Ms. Eve,

Please refer to the following revised quotation:

Commodity: Aluminium Ingot 99.9%

Price: USD1940/Mt CIF Port Klang

Quantity: 350 Mt

(d) *150 Mt for prompt shipment &*

(e) *200 Mt for May Shipment*

Origin: China

Payment:

(a) *150 Mt – 30% in advance & balance against faxed/emailed shipping documents*

(b) *200 Mt – 30% in advance & balance against faxed/emailed shipping documents*

Delivery: Within 30 days after receipt of your 30% advanced payment

Validity: Subject to final confirmation

Thanks & regards,

Ms. Koh Hue Fun

[Defendant]

(Emphasis added.);

(a) the plaintiff's email dated 3 April 2014 to the defendant (the plaintiff's email dated 3 April 2014):

From: Guan Yee Mei

(yeemei.guan@wascoenergy.com)

Sent: Thursday, 3 Apr, 2014 8:19 AM

To: Huefun Koh (hue@hotmail.com)

Cc: ...

Dear Ms Koh

We have done test on the sample by late evening yesterday.

The sample is acceptable. I will send you the PO soonest possible & please proceed for the necessary.

Thanks & regards,

Eve Guan

Purchasing Executive

[Plaintiff]

(Emphasis added.);

(b) the PO stated that the defendant was the 'VENDOR NO: V192, SUPPLIER/SUB CONTRACTOR';

(c) the defendant's proforma invoice and the two bank TT forms stated that the 'Beneficiary' was the defendant and not the Chinese supplier; and

(d) the defendant's commercial invoice and the defendant's packing list stated that the 'Customer' was the plaintiff.

Who was seller of aluminium ingots?

[20] In view of the undisputed contemporaneous documentary evidence in this case, it is clear that the defendant and not the Chinese supplier, was the 'seller' of the aluminium ingots to the plaintiff.

Was the defendant a purchasing agent of the plaintiff?

[21] The defendant's assertion that the defendant was the plaintiff's 'purchasing agent', is contrary to the undisputed contemporaneous documentary evidence in this case.

[22] There is no evidence that the plaintiff had employed the defendant to be the plaintiff's 'purchasing agent' within the meaning of s 135 of the CA. Section 135 of the CA provides as follows:

> *An 'agent' is a person employed to do any act for another or to represent another in dealings with third persons*. ... (Emphasis added.)

[23] In *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233, at p 237, Gopal Sri Ram JCA (as His Lordship then was) delivered the following judgment of the Court of Appeal:

> In the first place, the law does not require that an agency or sub-agency agreement must be in writing. See *Bowstead & Reynolds on Agency* (17th Ed) at p 55 et seq.
>
> Further, *Part X of the [CA], which contains the relevant provisions on agency does not contain any requirement that the appointment of an agent or sub-agent has to be in writing or be evidenced in writing. Hence the appointment may be express or implied, that is to say, it may be gathered from the facts and circumstances of a case and from the conduct of the parties*: see, *Kuchwar Lime & Stone Co v Dehri Rohtas Light Railway & Co Ltd* AIR 1969 SC 193.
>
> Another way of stating the proposition is that a party may, by his conduct in all the circumstances of a particular case, be estopped from asserting the absence of an agency relationship between him and he who claims to be his principal. (Emphasis added.)

[24] As I have explained above, the undisputed contemporaneous documents exchanged between the plaintiff and the defendant, clearly showed that the defendant was the 'seller' of the aluminium ingots to the plaintiff. In fact, the defendant's own documents, namely the defendant's commercial invoice and the defendant's packing list, clearly stated that the 'Customer' was the plaintiff. The terms 'agency', 'principal', 'agent' and 'commission' was not used in any of the contemporaneous documents in this case.

[25] The plaintiff had not acted in any manner in this case which could estop the plaintiff from denying that the defendant was the plaintiff's 'purchasing agent'.

What were terms and conditions of sale of aluminium ingots?

[26] The undisputed contemporaneous documents in this case, especially the plaintiff's email dated 3 April 2014, clearly showed that the defendant had agreed to sell aluminium ingots in accordance with the sample provided by the defendant to the plaintiff and the plaintiff had accepted that sample.

[27] The question that now arises is what is the legal effect, if any, of the documents between defendant and Chinese supplier. I am of the opinion that unless the documents between defendant and Chinese supplier had been incorporated into the contract of sale of aluminium ingots between the plaintiff and the defendant, Icannot consider the documents between defendant and Chinese supplier.

[28] In *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545, at pp 556–559, the Court of Appeal in a judgment given by Gopal Sri Ram JCA (as His Lordship then was) held that parties to a contract may incorporate a document into a contract by express words, by necessary implication or by conduct. There is no evidence that both the plaintiff and the defendant have agreed, either expressly or by necessary implication, to incorporate the documents between the defendant and Chinese supplier into the contract of sale of aluminium ingots in this case. Nor can such an incorporation be inferred from the conduct of the plaintiff and the defendant. This is understandable because the undisputed contemporaneous documents as explained above, clearly militated against the incorporation of the documents between the defendant and Chinese supplier into the contract of sale of aluminium ingots in this case.

Can ss 41 and 42 of the CA apply in this case?

Application of s 31 of the SGA in this case

[29] The defendant contended that, among others, the following contemporaneous documents showed that the aluminium ingots were to be delivered to the plaintiff by the Chinese supplier and not by the defendant:

(a) the exchange of emails between the plaintiff and the defendant;

(b) the defendant's commercial invoice;

(c) the defendant's packing list; and

(d) the BL.

In view of the above documents, the defendant submitted that the Chinese supplier (and not the defendant) had the obligation under the contract of sale of aluminium ingots to deliver the aluminium ingots to the plaintiff. Reliance was placed by the defendant on ss 41 and 42 of the CA which read as follows:

> *41 If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promise or his representatives may employ a competent person to perform it.*
>
> *42 When a promise accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.* (Emphasis added.)

[30] Before I discuss the scope and effect of s 41 of the CA, I need to refer to the following two statutory provisions which have not referred to by learned counsel for both parties:

(a) s 31 of the SGA — 'It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale' (Emphasis added.); and

(b) s 38(1) of the CA — 'The parties to a contract must either perform, or offer to perform, their respective promises, unless the performance is dispensed with or excused under [CA], or any other law' (Emphasis added.)

[31] In the High Court case of *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, at p 363, Edgar Joseph Jr J (as His Lordship then was) held in the High Court that 'In ordinary contracts for the sale of goods, delivery and payment are concurrent obligations'.

[32] In this case, I have decided that based on the undisputed contemporaneous documents, the 'seller' of the aluminium ingots was the defendant and not the Chinese supplier. Furthermore, the plaintiff had paid directly US$291,000 to the defendant for the first batch. Hence, I have no hesitation to find that the defendant (and not the Chinese supplier) had the obligation to deliver the aluminium ingots to the plaintiff under s 31 of the SGA.

[33] The defendant contended that the contemporaneous documents in this case showed the existence of the Chinese supplier and the fact that the plaintiff had actual knowledge of delivery of the aluminium ingots from the Chinese supplier. This may be so but the plaintiff had never dealt with the Chinese supplier and hence, there could not be a binding contract between the plaintiff and the Chinese supplier. Secondly, mere references in the documents in this case regarding the existence of the Chinese supplier and the delivery of aluminium ingots from the Chinese supplier, did not give rise to any legally binding relationship between the plaintiff and the Chinese supplier. Accordingly, the plaintiff could not enforce any contract with the Chinese supplier, let alone compel the Chinese supplier to deliver the aluminium ingots to the plaintiff.

[34] It is to be noted that s 31 of the SGA is a specific statutory provision applicable to goods while ss 38(1), 41 and 42 of the CA apply generally to all agreements. Section 31 of the SGA is a later statutory provision (enacted in 1957) as compared to ss 38(1), 41 and 42 of the CA (which have been enacted in 1950). Accordingly, if there is any conflict between s 31 of the SGA on the one hand and ss 38(1), 41 and 42 of the CA on the other hand, I am of the

considered view that the specific and subsequent statutory provision of s 31 of the SGA should be given preference. My opinion is premised on the application of the two following canons of statutory interpretation:

(a) the application of the maxim of statutory construction, *generalia specialibus non derogant*, namely a specific statutory provision should override a general statutory provision, as illustrated by the Federal Court's judgment delivered by Raja Azlan Shah CJ (Malaya) (as His Majesty then was) in *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119, at p 119; and

(b) the canon of statutory interpretation, *lex posterior derogat non priori*, provides that a subsequent legislative enactment should prevail over an earlier statutory provision. An example of the application of this canon is in the judgment of Good J in the Federation of Malaya's Court of Appeal case of *Chai Wooi v Public Prosecutor* [1957] 1 MLJ 234, at p 236.

Application of s 38(1) of the CA

[35] In addition or as an alternative to my above interpretation of s 31 of the SGA, I shall now consider ss 38(1), 41 and 42 of the CA in this case.

[36] Section 38(1) of the CA states the general rule that a contracting party 'must' perform his or her promise (general rule) unless that performance is dispensed with or excused by CA or any other law. The exceptions to the general rule are provided in ss 41 and 42 of the CA whereby the contracting parties allow a third party to perform a promise made by a contracting party. The exceptions to the general rule are described as vicarious performance of contractual obligations by a third party or stranger to the contract in question.

The defendant cannot rely on s 41 of the CA

[37] I am of the considered view that the defendant cannot rely on s 41 of the CA because the undisputed contemporaneous documents clearly evidenced the intention of both the plaintiff and the defendant that the aluminium ingots in this case should be delivered by the defendant and not by the Chinese supplier.

[38] Even if I assume s 41 of the CA applied in this case, namely the defendant's promise to deliver the aluminium ingots could be performed by the Chinese supplier as the defendant's agent, there must still be a valid and proper performance of that promise by the Chinese supplier. In other words, the Chinese supplier was still legally obliged under the contract of sale as the

defendant's agent to deliver to the plaintiff aluminium ingots and not white powder. The plaintiff cited Augustine Paul JC's (as His Lordship then was) judgment in the High Court case of *Lim Yoh v Astana Strategi (M) Sdn Bhd & Anor* [1998] 3 MLJ 117, at p 133, as follows:

> It is significant to observe that *the primary responsibility in completing the agreement is on the plaintiff herself. This is because the parties have agreed in the Second Schedule to the agreement that the balance of the purchase price '... shall be paid by the Purchaser to the Vendor ...'. That, of course, does not preclude the plaintiff from appointing an agent to act on her behalf in accordance with s 41 of the CA. However, any agent whom the plaintiff appoints must also be ready, willing and able to complete the contract as agreed between the parties*. In this regard, *Chitty on Contracts* (27th Ed) Vol I says at para 19-046:
>
> > *A contracting party can in the case of many contracts enter into an arrangement by which some other person may perform for him, as far as he is concerned, the obligations of the contract, and the other contracting party will be obliged to accept that performance if it is performance in accordance with the terms of the contract. The contracting party will, however, be liable for any breach that may happen, and the other contracting party is not bound or, indeed, entitled to sue the substituted person for breach of contract*, although there may, course, be a remedy in tort, eg where the substituted person negligently damages or causes the loss of goods entrusted to him. This is technically known as vicarious performance, and it is 'quite a mistake to regard that as an assignment of the contract; it is not' (*Davies v Collins* [1945] 1 All ER 247).
>
> The rationale for the relationship between a principal and an agent is anchored on the premise that the agent is merely standing in the principal's shoes and is not entitled to any special right, privilege or immunity not enjoyed by the latter. *Where a person performs a contract through an agent, he remains liable personally* (see *Stewart v Reavell's Garage* [1952] 2 QB 545). It is settled law that in no case can the authority of an agent exceed the power of the principal to act on his own behalf (see *Shrewsbury & Birmingham Rly Co v North Western Rly Co* (1857) 6 HL Cas 113; *Montreal Assurance Co v McGillivray* (1859) 13 Moo PCC 87; *Ashbury Railway Carriage & Iron Co v Riche* (1875) LR 7 HL 653). An agent is a mere instrument and it is the principal who bears the risk of inadequate representation (see *Norwich and Peterborough Building Society v Steed* [1993] Ch 116). *The agent must comply strictly with the terms of what he has agreed to do, and is in breach of contract if he exceeds his authority on the one hand, or fails to carry it out on the other* (see *Fray v Voules* (1859) 1 E & E 839; *Butler v Knight* (1867) LR 2 Ex 109; *The Hermione* [1922] P 162; *Apatu v Peach Prescott & Jamieson* [1985] 1 NZLR 50). It is the duty of an agent to carry out the business he has undertaken and he must inform his principal promptly if it is impossible to do so (see *Cassaboglou v Gibb & Ors* (1882-83) 11 QBD 797). Where an agent is employed to carry out any transaction which involves a payment to him on his principal's behalf, he must not compromise his principal's rights (see 45 *Halsbury's Laws of England* (4th Ed) para 783)." (Emphasis added.)

[39] It is clear from *Lim Yoh* that even if this court assumes that s 41 of the CA applies in this case:

(a) the Chinese supplier is legally obliged as the defendant's agent to deliver to the plaintiff aluminium ingots and not white powder; and

(b) upon the Chinese supplier's failure to deliver the aluminium ingots to the plaintiff, the defendant as the seller of the aluminium ingots and as the Chinese supplier's principal, was liable to the plaintiff under the contract of sale of aluminium ingots.

Section 42 of the CA does not apply in this case

[40] Section 42 of the CA, in my respectful view, does not apply in this case because it is clear from the undisputed contemporaneous documents that the plaintiff did not accept delivery of aluminium ingots from the Chinese supplier. I rely on the following cases:

(a) the Federal Court's judgment given by Ali FJ in *Haji Nik Ishak bin Haji Nik Daud v Nik Zainab binti Nik Jaafar* [1975] 2 MLJ 82, at p 83:

> However, the more important question in this case is whether the respondent is liable for the balance of the purchase price, particularly the amount $7,000. But for the agreement between the appellant and Nik Abdul Majid which is admitted I would have no hesitation in giving an affirmative answer. The effect of the said agreement, as it seems to me, is that *upon the appellant's acceptance of Nik Abdul Majid's promise to pay or settle the amount $7,000 the respondent was discharged from the liability to pay. The law here, in my view, is the same as in India. I am referring, of course, to s 42 of the CA which is identically the same as* s 41 of the Indian Contract Act (Emphasis added.); and

(b) Abdul Razak J's judgment in the High Court in *Scott & English (Malaysia) Sdn Bhd v Foo Thor Lombong Bijih Sdn & Anor* [1985] 1 MLJ 73, at p 74, as follows:

> The first defendant contended that since the second defendant had performed the promise made between them, they should not be held liable.
>
> This is based on s 42 of the CA ...
>
> In support of the contention, he cited the case of *Haji Nik Ishak v Nik Zainab* [1975] 2 MLJ 82 as authority for that proposition. There the appellant had transferred his land to the respondent and the respondent had transferred his land to the appellant for $25,000 and $14,000 respectively. There was a balance of $11,000 due from the respondent to the appellant. The respondent's son agreed to pay the amount, but did not do so.
>
> The appellant then sued the respondent for the sum, but the Federal Court held as the appellant had agreed to accept the offer to settle the amount by the respondent's son, he was precluded from enforcing it against the respondent. But Ali FJ's judgment can be distinguished. There, there was a specific

representation made by the third party. The defendant's son told the plaintiff that he would discharge the defendant's obligation which offer the plaintiff agreed to accept. This was so clearly stated by the plaintiff himself in the statement of claim. *In our case, however, there was no such agreement to accept the second defendant's performance in place of the first defendant. I think there was no doubt also that as the section itself [s 42 CA] provides, there must be performance before the section can apply. Once performed, the promisee cannot go again against the promisor, but clearly this was not the case before me because the contract was never performed by the second defendant since the cheques they gave in payment of the debt were all dishonoured.* The authorities are clearly in support. In the *Har Chandi Lal & Ors v Sheoraj Singh* 39 IC 343*, the Privy Council said: 'It need hardly be added that this section applies only when a contract has in fact been performed by a third person*'. *Pollock & Mulla* (9th Ed p 361) is also to the same effect. (Emphasis added.)

[41] The Supreme Court's judgment in *Chinn Swee Onn v Puchong Realty Sdn Bhd* [1990] 1 MLJ 108, at pp 109–110, relied on by the defendant, can be easily distinguished from the present case as in *Chinn Swee Onn* there was part payment of the judgment sum to the judgment creditor by a third party and this had triggered the application of s 42 of the CA in that case.

[42] Secondly, even if I assume that the plaintiff had accepted the performance of the contract of sale of aluminium ingots by the Chinese supplier (and not by the defendant), there must still be a valid and proper performance of that promise by the Chinese supplier to deliver to the plaintiff aluminium ingots and not white powder. I rely on the following cases:

(a) in *Letchumi Ammal v Nam Fong Housing Sdn Bhd* [1982] 2 MLJ 19, at p 21, the Federal Court in a judgment given by Syed Othman FJ held as follows:

> *We do not think s 42 of the CA can apply here for these reasons:*
>
> *First, performance was not done within the stipulated time, as promised.*
>
> Secondly, the appellant's plea in her defence that she was unable to perform because the tenant had refused to vacate the house cannot be accepted in view of her express undertaking under the agreement.
>
> *Thirdly, the performance by the tenant by reason of his being paid by the owner cannot be regarded as performance by the third person within the meaning of s 42 of the CA, as the tenant was in the same position as the appellant. ...*
>
> *Fourthly, the owner, by getting back the land, did not get any benefit. What he got was rightly his from the beginning. (Emphasis added);*

(b) *Scott & English (M) Sdn Bhd*, at p 74; and

(c) in *Chegamull Suganmull Sowcar v V Govindaswami Chetty and Ors* AIR 1928 Mad 972, at p 974, the Madras High Court decided as follows

regarding s 41 of the Indian Contract Act 1872 ('ICA'):

> *[Section 41 ICA] does not say that the original obligation comes to an end, merely because the promise accepts from a stranger a fresh promise in the place of the old one. Much more than a bare promise is necessary under the section. What it contemplates is actual performance of the original promise. (Emphasis added.)*

I accept *Chegamull Suganmull Sowcar* as our s 42 CA is in *pari materia* with s 41 of the ICA.

[43] There is a third reason why s 42 of the CA can not apply in this case. The purpose of s 42 of the CA is to ensure that if a promisee has accepted the performance of a contractual obligation by a stranger to the contract, the promisee cannot be unjustly enriched by 'double satisfaction' of the same contractual obligation by insisting that the promisor also performs the same contractual obligation. I accept the Indian Supreme Court's judgment given by Bhan J in *Citibank NA v Standard Chartered Bank* [2004] 1 SCC 12, at pp 35–36, para 51, as follows:

> *Section 41 [ICA] only provides that the promise cannot have double satisfaction of its claim, ie from the promisor as well as a third party. It does not give a cause of action to the promise, but to the promisor, to contend that the promise who has accepted satisfaction from the third party cannot insist on the satisfaction of its claim from the promisor as well.* (Emphasis added.)

In this case, the plaintiff did not receive aluminium ingots as promised by the defendant. The plaintiff cannot be alleged to have been unjustly enriched in this case so as to attract the application of s 42 of the CA.

Was there a breach of contract of sale of aluminium ingots in this case?

[44] When the plaintiff received the white powder instead of aluminium ingots, the defendant had breached the following two implied conditions of the contract of sale of aluminium ingots:

(a) the defendant had breached the implied condition under s 15 of the SGA that the matter received by the plaintiff should correspond with the description of aluminium ingots given in the PO, the defendant's proforma invoice and the defendant's commercial invoice. I cite two local cases on s 15 of the SGA:

(i) Abdul Malik Ishak JCA's judgment in the Court of Appeal case of *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2010] 3 MLJ 425, at pp 434–435, as follows:

lt is germane, at this juncture, to refer to s 15 of the SGA. That section enacts as follows:

Sale by description.

15 *Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description*; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

This section covers two types of cases, namely, failure to secure exact conformity with the full contractual description of goods and, consequently, a total failure to perform the contract. In the first type, although the goods are substantially what the buyer wants, yet the discrepancy is in relation to some contract particulars. In *Edmund Bowes, JB Martin and WL Kent v Charles Shand, Alexander Shand and RA Robinson* (1877) 2 App Cas 455 (HL) for instance, where the goods were rejected because they were not shipped within the specified period. *In the second type, the goods supplied are to be regarded as not being the goods ordered and thus the contract is said not to be performed.* (Emphasis added.); and

(ii) the judgment of Fisher J in the High Court case of *Nagurdas Purshotumdas & Co v Mitsui Bussan Kaisha Ltd* [1911] 12 SSLR 67; and

(b) the implied condition under s 17(2)(a) of the SGA that the matter received by the plaintiff should correspond with the aluminium ingot sample given by the defendant (the defendant's email dated 21 March 2014 and the plaintiff's email dated 3.4.2014). I rely on the English High Court's judgment in *E & S Ruben Ltd v Faire Bros & Co Ltd* [1949] 1 All ER 215, at pp 218–219, regarding the English Sale of Goods Act 1893 (English SGA). It is to be noted that our SGA is based on the English SGA.

[45] There was a third breach of the contract of sale of aluminium ingots under s 57 of the SGA when the aluminium ingots were not delivered at all by the defendant to the plaintiff. Section 57 of the SGA reads as follows:

Where the seller wrongfully neglects or refuses *to deliver the goods to the buyer, the buyer may sue for damages for non-delivery* (Emphasis added.)

How much could the plaintiff recover as damages for breach of contract of sale of aluminium ingots?

[46] Section 61 of the SGA provides as follows:

> 61(1) *Nothing in this Act shall affect the right of* the seller or *the buyer* to recover interest or special damages in any case where by law interest or special damages may be recoverable, or *to recover the money paid where the consideration for the payment of it has failed*.
>
> (2) *In the absence of a contract to the contrary, the court may award interest at such rate as it thinks fit on the amount of the price -*
>
> (a) ...;
>
> (b) *to the buyer in a suit by him for the refund of the price in a case of breach of the contract on the part of the seller, from the date on which the payment was made*.
>
> (Emphasis added.)

[47] Since the plaintiff did not receive the first batch of aluminium ingots at all, there is a total failure of consideration which entitled the plaintiff to recover US291,000 under s 61(1) of the SGA. Suffices for me to cite the Court of Appeal's judgment in *Tan Ah Tong v Che Pee Saad & Anor and Other Cases (Consolidated)* [2010] 6 CLJ 560, at p 569.

[48] In respect of the defendant's non-delivery of the aluminium ingots, firstly i find that the plaintiff had fulfilled the duty to take reasonable steps to mitigate its loss by purchasing aluminium ingots from a third party by paying the replacement cost. There is a duty imposed on an innocent contracting party to mitigate his or her loss arising from a breach of contract:

(a) the explanation to s 74 of the CA; and

(b) the Federal Court's judgment given by MacIntyre FJ in *Kabatasan Timber Extraction Co v Chong Fah Shing* [1969] 2 MLJ 6, at p 8.

[49] Once the plaintiff has fulfilled the duty to take reasonable steps to mitigate its loss in respect of the non-delivery of the aluminium ingots, the plaintiff may then claim damages for the defendant's non-delivery of the aluminium ingots. The SGA is silent on the measure of damages for non-delivery of goods under s 57 of the SGA. As such, the general provision of s 74 of the CA may apply in this case. This is clear from the following judgment given by Thomson CJ (as His Lordship then was) in the Federation of Malaya's Court of Appeal case of *Lee Heng & Co v C Melchers & Co* [1963] 1 MLJ 47, at p 47:

> *The measure of damages in such a case is normally the difference, if any, between the market value of the goods supplied and the market value of the goods ordered, both values being taken as at the date of delivery*. This is not because of anything contained in sub-s (3) of s 53 of the English SGA, for there is no corresponding sub-section in s 59 of the SGA. The law on the subject in this country is the general law relating to

compensation for loss caused by breach of contract. *That law is set out in s 74 of the CA which is the same as s 73 of the ICA, which was held by the Privy Council in the case of Jamal v Dawood 431 A 6 to be merely declaratory of the English common law relating to damages*. (Emphasis added.)

[50] Section 74(1) and (2) of the CA provide as follows:

Section 74 Compensation for loss or damage caused by breach of contract.

74(1) *When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

74(2) *Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach*. (Emphasis added.)

[51] In addition to *Lee Heng & Co*, the following cases have held that for non-delivery of aluminium ingots, the plaintiff is entitled to claim for the sum of US$103,539.15 (differential cost) as the difference between the price to be paid to the defendant (US$679,000) and the replacement cost at the time of delivery of the aluminium ingots:

(a) the Supreme Court's judgment given by Peh Swee Chin SCJ in *Eikobina (M) Sdn Bhd v Mensa Mercantile (Far East) Pte Ltd* [1994] 1 MLJ 553, at pp 560–562, as follows:

> *After liability on a contract is established and when it comes to assessment of damages, two questions are always involved. The first is that no compensation can be awarded for damage that is too remote and the second is that in assessing damage that is not too remote, the correct measure of damages must be adopted, ie the correct and usual principles of quantifying the monetary compensation must be employed.* ...
>
> The relevant sections in our [SGA] are ss 57 and 61. ...
>
> In our s 57, we do not have ss 51(2) and (3) of the English SGA but our s 61 is the more detailed corresponding section of s 54 of the English SGA. Therefore, English common law as embodied in the said ss 51(2) and (3) applies and in this connection, please see a similar observation by the Court of Appeal in *Lee Heng & Co v Melchers & Co* in dealing there with another section, ie s 59 of the SGA, in connection with the application of English common law.
>
> Having regard to the foregoing paragraphs, *the normal measure of damages from the case law is, as stated in s 51(3)* of the English SGA *as set above, basically the difference between the contract price and market price at the time of the breach where there is an available market for the goods in question.*
>
> It is pertinent to point out straightaway that *the market price in the instant case would be, according to the normal measure of damages, the market price or*

current price of the goods in question as at 27 July 1987 (date of breach as found by the learned judge at the main trial) when the said vendor ought to have delivered the goods in question. (Emphasis added.); and

(b) the judgment of the Federation of Malaya's Court of Appeal delivered by Thomson CJ (as His Lordship then was) in *Lee Sau Kong v Leow Cheng Chiang* [1961] 1 MLJ 17, at pp 20–21.

[52] It is clear that the replacement cost incurred by the plaintiff is not too remote within the meaning of s 74(2) of the CA. Indeed, the replacement cost had been necessarily incurred by the plaintiff in its mitigation of loss due to the defendant's breach of the contract of sale of aluminium ingots.

[53] In conclusion, the plaintiff is entitled to the sum claimed which constitutes the following:

(a) return of US291,000 paid earlier by the plaintiff to the defendant for the first batch; and

(b) the differential cost.

Is there any issue to be tried in this case?

[54] In this application, the defendant did not dispute that the following three matters required by O 14 rr 1(1) and 2(1) of the RC ('three conditions for summary judgment') had been satisfied by the plaintiff:

(a) the statement of claim of this suit ('SOC') had been served on the defendant;

(b) the defendant had entered appearance; and

(c) the plaintiff had affirmed an affidavit verifying the facts on which the SOC was based and the belief of the deponent of the plaintiff's affidavit that the defendant had no defence to the SOC.

[55] The three conditions for summary judgment has been decided by our Federal Court in the following cases:

(a) *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 at p 689–690; [2006] 3 CLJ 544at pp 551–552; and

(b) *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 at p 301; [1984] 1 CLJ Rep 283, at p 285.

[56] As held in *Cempaka Finance Bhd* and *National Company for Foreign Trade*, once the three conditions for summary judgment have been satisfied by the plaintiff, the burden shifts to the defendant to resist this application by

satisfying this court under O 14 r 3(1) of the RC that there is 'an issue or question in dispute which ought to be tried'. A

[57] Based on the undisputed contemporaneous documents in this case, there is no 'issue or question in dispute which ought to be tried'. It is clear that the defendant cannot rely on both ss 41 and 42 of the CA in this case. B

Is there 'some other reason' for a trial of this case?

[58] As decided in *United Merchant Finance Bhd*, I will now inquire whether there is any circumstance which ought to be investigated in this case so as to warrant a trial of this suit. C

[59] It is clear that fraud has been committed in this case wherein white powder has been delivered instead of aluminium ingots. The Chinese supplier is not above suspicion. D

[60] For the purpose of deciding whether there is some other reason for trial under O 14 r 3(1) of the RC, I consider the following matters: E

(a) the previous transactions clearly fortify my above finding that the 'seller' of the aluminium ingots was indeed the defendant and not the Chinese supplier. The plaintiff had never dealt with or communicated with the Chinese supplier in respect of the previous transactions;

(b) the documents between defendant and Chinese supplier showed that the defendant dealt with the Chinese supplier as a purchaser of aluminium ingots in its own right and then the defendant would re-sell those aluminium ingots to the plaintiff at a profit. The defendant's PO to Chinese supplier showed that the defendant had purchased the first batch at a price of US$240,000. If there had been no fraud in this case and the 'back-to-back sale' had been carried out, the defendant would have enjoyed a handsome profit of US$51,000 (the defendant was paid US$291,000 for the first batch); F G

(c) the defendant's police report clearly stated that the defendant had ordered the aluminium ingots from the Chinese supplier. There was no mention in the defendant's police report that the defendant had merely acted as the plaintiff's 'purchasing agent'. in fact, the defendant's police report did not state that the defendant had sold the aluminium ingots to the plaintiff; H I

(d) the defendant's letter dated 5 June 2014 stated that the defendant was in the process of making an insurance claim. Such an assertion supports my

finding that the 'seller' of the aluminium ingots was the defendant which had an insurable interest in the matter to be delivered to the plaintiff; and

(e) the exchange of emails between the defendant and Chinese lawyers (which showed the defendant's intention to take legal action in China against the Chinese supplier) supports this court's finding that the defendant was acting in its own right vis a vis the Chinese supplier. If the defendant was indeed the plaintiff's 'purchasing agent'. the defendant would not have sought for legal advice in China without authorisation from its principal, the plaintiff.

[61] Premised on the above reasons, there is no 'Some Other Reason For Trial'. The plaintiff's claim against the defendant is clear as is also clear that the defendant had been defrauded in this case, perhaps by the Chinese supplier.

Can the plaintiff claim interest on sum claimed?

[62] Section 61(2)(b) of the SGA expressly allows the plaintiff to claim interest on the sum of US$87,300 and US$203,700 from the date of such payments by the plaintiff to the defendant. As I have explained above, the SGA is a specific statute governing sales of goods.

[63] The plaintiff is contented to rely on s 11 of the Civil Law Act 1956 ('CLA') to claim pre-judgment interest at the rate of 5%pa ('pa') from 19 May 2014 (date of delivery of the first batch and the date of accrual of the plaintiff's cause of action for breach of sale of aluminium ingots) until the date of summary judgment. Such a claim for interest under s 11 of the CLA is clearly maintainable as stated by the Federal Court in *Lim Kar Bee v Abdul Latif bin Ismail* [1978] 1 MLJ 109, at p 120.

[64] Order 42 r 12 of the RC read with the Practice Direction No 1 of 2012 by the learned Chief Justice clearly entitle the plaintiff to claim 5% interest pa from the date of this summary judgment until full payment by the defendant.

COURT'S DECISION

[65] In view of the above reasons, I have no hesitation to allow this application with costs. In closing, I must thank learned counsel from both parties for their helpful written and oral submission.

Application allowed with costs

Reported by Afiq Mohamad Noor